

COMMENTS ON THE PROPOSED AMENDMENTS TO MCR 2.513

The Sixth Judicial Circuit Court Judges have reviewed the proposed changes to court rules concerning jury trials. In general, the changes merely reorganize existing rules into more logical order. For example, granting discretion to the trial judge to allow note-taking and questioning of witnesses by jurors is not new. In fact, over the years many judges of this court have successfully utilized these procedures. The new procedures contained in the proposals seek to enhance juror understanding so as to expedite and simplify jury deliberations. We certainly support that effort.

However, critical to effective trial management is the discretionary aspect of these rules. Experienced trial judges must continue to have authority over the trial process in their courtrooms. Only a jurist familiar with the particular facts, complexities, and participants in a particular case can appropriately assess the implications and proper use of these discretionary procedures. Additionally, the judges have considered the effects of the new proposals and the impact of their adoption. With these issues in mind, the following observations and concerns are noted for your consideration:

- 1) Proposed Rule 2.513(A) would require the judge when giving preliminary instructions to communicate to the jury, in addition to the current instructions, the law applicable to the case, elements of all civil claims or all charged offenses, as well as the legal presumptions and burdens of proof. A copy of these instructions must be provided to each juror.
 - a. Generally, preliminary instructions are not provided in written form. This would add to the pretrial preparation of a case.
 - b. At the outset, the judge describes the function of the jury as fact finder. Emphasis on the law applicable to the case at this early point in the case will unduly burden the jurors with information they do not need and may distract the jury as they hear and process the testimony and other evidence. Opening statements of counsel generally include the law they believe is applicable to the case, elements to be proven, and a discussion of the presumptions and burdens of proof. Why is it necessary for the judge to discuss these matters? In many cases, the legal issues to be decided by the jury change depending on the proofs and motions during trial. Having the judge tell the jury one thing at the beginning of the trial (and commit it to writing for each juror) and then instruct differently at the end of the trial can only confuse jurors.
- 2) Proposed Rule 2.513(D) would permit interim commentary by the parties at the discretion of the judge. Despite the discretion afforded the trial judge, this procedure can only create issues for appeal, particularly in criminal cases.

- 3) Proposed Rule 2.513(E) requires the judge to “encourage” counsel to prepare reference notebooks. Exactly how this rule would be employed is troubling. Does each counsel prepare separate notebooks, thus giving each juror two notebooks? Does the content of the notebooks create yet another pretrial dispute requiring the judge’s time and attention? What is “appropriate information”? The rule seems to anticipate that items will be added to the notebooks requiring multiple copies of some (but obviously not all) exhibits. While the purpose seems to be to reduce the note taking by jurors, is this the result?
- 4) Proposed rule 2.513(G) permits the trial judge to “craft” procedures for presentation of expert testimony. All judges want to streamline the presentation of this testimony, but often distance and availability dictate the order of proofs. Such innovation should never be required. In particular, expert panels permitted to question each other should not be allowed in criminal cases as this would clearly implicate Fifth and Sixth Amendment protections. The trial judge must have the final word in determining what procedures will be employed in his/her courtroom.
- 5) Proposed Rule 2.513(J) allows jurors to request a view of a place or property. The court rarely transports jurors for a view for some very practical reasons:
 - a. The personnel necessary to transport and “guard” the jury is expensive and difficult to provide.
 - b. The county must have a vehicle available in which to transport the jurors.
 - c. The time involved will lengthen the trial by at least a half day.
 - d. Photographs and videotape presentations can provide the information required.
 - e. A view will rarely affect the outcome of the trial.

The rule does not address when and how the jury request for a view would be made. During trial or during deliberations? Can the request of one juror trigger a view, or does there need to be a vote of jurors? A majority vote or unanimous or something else? Additionally, the provision in the current rule permitting the judge to allocate the cost involved to one or both of the parties has been deleted. Was this intentional? See current MCR 2.513(A).

- 6) Proposed Rule 2.513(K) permits the trial judge to allow the jurors to discuss the case during recesses. All judges consulted perceived a danger to jury deliberations if this rule is adopted. Relaxation of the rule against early discussion has the potential to interfere with objective evaluation of all witness’ testimony. These discussions are more likely to harm the defense case in both civil and criminal cases as the jury may take strong positions before the defense has had opportunity to present its case. Additionally, the court frequently selects alternate jurors who are not permitted to participate in deliberations except by stipulation of the parties. This rule would allow alternates to participate in the interim discussions, but not the final deliberations.

- 7) Proposed Rule 2.513(M) expands on the rule which permits the trial judge to comment on the weight of the evidence. That the rules already permit comment by the trial judge and judges seldom, if ever, avail themselves of the opportunity speaks volumes about the usefulness of the rule. Clearly, the trial judges simply see such action as another issue for appeal. Expanding the rule is unlikely to entice more judges to take a chance.
- 8) Proposed Rule 2.513(P) permits the trial judge to give audio or video recordings of testimony to the jury as well as immediate transcripts. While each court's manner of making the record will dictate the alternative selected, the rule does not include permitting the court reporter to "read back" testimony from his/her notes. Is this an intentional omission? If so, will courts be required to select among audio, video, or real-time court reporters to make the record? Budget implications must be considered.
- 9) Proposed Rule 2.513(N)(2) permits the jury, during deliberations, to ask questions about the judge's instructions. The judges favorably considered the opportunity for jurors to request clarification of instructions. While judges of this court have reinstructed upon request of the jury for decades, it may be necessary to provide clear guidance to judges who may hesitate to invite questions from the jury. Clearly, the trial judge should insure that jurors understand their responsibilities and the law they are to apply. Thus, we strongly support this new rule.

However, the requirement that questions be submitted in a sealed envelope seems unnecessary and cumbersome. Jury communications on other matters are not sealed.

- 10) Proposed Rule 2.513(N)(4) permits the judge to invite the jurors to identify the issues that divide or confuse them. Again, permitting the judge to clarify the law or instructions will assist the jury in arriving at a verdict. The new rule will avoid objection by counsel and encourage judges to provide appropriate assistance to the jury.

When considering adoption of new rules, the Supreme Court should consider the views of experienced trial judges as well as the potential cost and added length of trials such changes may cause. We appreciate the opportunity to offer our insight and concerns, and are available to respond to any questions you may have.